No. 44815-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHERMAN CLAY ROBERTS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Jerry T. Costello, Trial Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in failing to dismiss the charges after prosecutorial misconduct deprived appellant Sherman Roberts of his due process rights to a fair trial.

2. The sentencing court acted outside its statutory authority in ordering forfeiture of property based on the convictions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At trial, after detailed discussions and a court ruling on the prosecution's wish to introduce evidence of a prior conviction for sexual abuse of the same victim, the prosecutor then injected into the case the specter of the defendant's uncharged sexual misconduct involving two other victims. Did the trial court abuse its discretion in failing to dismiss the charges as a result?

2. A sentencing court is limited to imposing only those sentences supported by statute. Did the trial court act outside its statutory authority in ordering forfeiture of property as a condition of the sentences even though there was no statute authorizing such an order?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Sherman Clay Roberts was charged by second corrected information with one count of third-degree child molestation and two counts of third-degree rape of a child. CP 38-39; RCW 9A.44.079; RCW 9A.44.089. Pretrial and trial proceedings were held before the Honorable Jerry Costello on March 18-21, 25 and 26, 2013, after which the jury

found Roberts guilty as charged. CP 107-109.[1] On April 25, 2013, Judge Costello imposed concurrent standard-range sentences. CP 114-29.

Roberts appealed and this pleading follows. See CP 130.

2. Testimony at trial

In 2013, A.B. was in her mid-thirties. RP 120-25. That year, she testified that, in about 1989, when she was 13 years old, her stepfather, Sherman Roberts, touched her in an improper way. RP 120-25. A.B.'s mom and Roberts had gotten together when A.B. was about three years old and, A.B. said, she thought of Roberts as her dad. RP 124. The touching started as "kind of games" and occurred, A.B. said, in her room, which was "downstairs in the basement." RP 126. A.B.'s mom, however, testified that A.B. never had a room in the basement. RP 182, 208.

A.B. did not remember how long it went on but recalled that, at some point, Roberts moved out of the house and into an apartment. RP 127. She thought he had moved out in 1989, when Roberts and A.B.'s mom had "kind of split up." RP 127.

Three years later, in 1992, A.B. would go to a nurse at her high school and say that it was happening again. RP 128. She testified at trial that she wanted it to stop and figured that was the way to do it. RP 130. According to A.B., the sexual contact would occur at his apartment and he would show up when she was at the home of a friend, would act like he needed to see A.B. for some reason, then would take her or go with her to his apartment and ask her to do "sexual things." RP 128, 15. A.B. said

[1]The verbatim report of proceedings is chronologically paginated.

that once, when they were on the bed in the apartment, he said he was "only going to insert the tip inside" her and it would not hurt, after which he did what he said. RP 129, 135. A.B. also said that, at some point, he touched her vagina and breasts and penetrated her with his fingers, as well as having her grab his penis. RP 136.

A.B. first said that it was "happening continuously" from 1989 to 1992. RP 129. She also said, however, that she could not remember how often it happened. RP 129. And she said that it was "just once in a while" that he would bring her to his apartment. RP 129. Then she said he touched her every time she was at the apartment and he would have an orgasm after she touched him. RP 137.

After A.B. talked to the school nurse, A.B.'s mom was called and she came to the school. RP 130-32. A.B. thought her mom and Roberts came together and even said she thought it was very "odd" to be in the car with Roberts on the way home. RP 130-33. A.B. remembered that, when they got home, Roberts left. RP 132.

Connie Witt, A.B.'s mother, recalled getting the phone call from the school nurse in 1992 and going to the school. RP 184-85. Witt first said that Roberts had "nerve enough" to go to school with her and that they all went home in the same car after the nurse took her aside and told her about A.B.'s claims. RP 185. A few moments later, however, Witt denied that Roberts was in the car, instead saying he had met her at the high school and only followed them home to the house afterwards. RP 187, 193.

A.B. first testified that she had not seen Roberts after that. RP 132.

Ultimately, however, in cross-examination, A.B. admitted that only a few years after she told the nurse Roberts was abusing her A.B. voluntarily drove to Oregon to visit with Robert's brother and then drove to Texas with Roberts himself. RP 146. Only Roberts and A.B. were in the vehicle on the several day-long drive. RP 146. A.B. said that, when they arrived in Texas she stayed at his house for awhile, probably a week. RP 146.

Also at the house was Roberts' wife. RP 146, 165. A.B. nevertheless claimed that, when they got to Texas, Roberts asked for "sexual favors." RP 146, 165. A.B. did not claim that Roberts made any such requests of her on the drive when they were alone for days, however. RP 146, 165.

According to A.B., she had told her mom what had happened right after A.B. returned from being in Texas. RP 170, 205. A.B.'s mom, however, testified that she did not know that A.B. had even gone to visit Roberts in Texas. RP 205. In fact, when asked, Witt said she did not even know why A.B. would visit Roberts "after what he has done." RP 205. Witt was clear she did not pick up her daughter from the airport after a visit to Texas at any point. RP 205-206. She also denied having any memory of talking to Roberts on the phone about that visit and A.B.'s return home. RP 205-206.

A.B. did not remember talking to anyone other than the nurse and a doctor at the hospital. RP 138. She did not recall being interviewed by a CPS caseworker in 1989 or going into a school counseling program. RP 155. She also did not recall being interviewed by a detective in 1992 or any officer showing up at school and talking to her after she spoke to the

school nurse. RP 154-55.

Witt conceded that she had told A.B. that Witt, herself, had been abused by her own stepfather. RP 206. This conversation occurred when A.B. was about 13. RP 206. A.B., however, denied any recall of such a conversation. RP 158.

A.B. also did not recall that it was Roberts himself who had called and turned himself into police in 1989. RP 159, 211. Witt also initially denied knowing that. RP 194. When confronted with a statement from that time, however, Witt recalled that not only had Roberts called the police on himself but he had also agreed to go to counseling to get help. RP 198-99, 211. He called police after a meeting where A.B. and her friend told Witt that Roberts had been abusing her. RP 172, 204.

Roberts had been the janitor at a middle school for quite some time and lost his job as a result of his calling police. RP 172, 204.

Dr. Yolanda Duralde was working at the sexual assault clinic in July of 1992 when A.B. was brought in for an exam. RP 286-87. Duralde was clear that A.B. said the touching had started when she was 11, not 13. RP 296. She also said that A.B. had said in 1992 that the touching had only started again "about a year ago," and that it was more "aggressive" than before. RP 296-97. Duralde looked at records from 1990 on A.B. and noted there was a "change" to A.B.'s hymen "consistent with penetrating trauma." RP 297-98.

Detective James Calaway was retired by the time of trial but had worked on the case in 1992 after getting a referral from Child Protective Services. RP 263-66. When he spoke to A.B. back then, she made a

disclosure that the last incident had happened in February of that year, two days before she reported it to "CPS." RP 269. A.B. told the detective that "things" happened in the downstairs bedroom. RP 271.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO DISMISS AFTER THE PROSECUTOR INTRODUCED THE SPECTER OF UNCHARGED SEXUAL MISCONDUCT WITH TWO OTHER VICTIMS

In general, evidence of "other crimes, wrongs or acts is not admissible" to prove the "character" or "propensity" of the defendant. ER 404(b). The reason such evidence is inadmissible is because it has such an extraordinarily prejudicial effect. See State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984). And where the "prior bad act" evidence involves sexual misconduct, the prejudice is so great that our courts have found that any doubts about whether the evidence should be admitted should be resolved in favor of exclusion of the evidence. See, State v. Myers, 49 Wn. App. 243, 742 P.2d 180 (1987).

In this case, the trial court abused its discretion in denying Roberts' motion to dismiss after the prosecutor effectively introduced improper "prior bad act" evidence of uncharged sexual misconduct with two other victims.

a. Relevant facts

Before trial, there was a lengthy discussion about whether the prosecution should be allowed to elicit testimony from A.B., her mother and others about the abuse in 1989, including Roberts' admission in his pleas from that case. RP 59-64, 75, 80-81, 93-99. After the court ruled

the evidence was admissible to prove "lustful disposition," Roberts then tried to minimize the harm by entering a stipulation that Roberts had plead guilty in January of 1990 to two felony sex offenses involving A.B. and had admitted to sexual contact with her between May 1, 1989, and September 15, 1989. CP 43-46; RP 104.

Part of the discussion of the prior bad acts included mention of the need for the prosecutor to lead witnesses in order to avoid having them introducing evidence outside the court's ruling on ER 404(b). RP 98-100.

Then, at trial, after Witt claimed not to recall that Roberts had turned himself in to police in 1989, counsel asked about the meeting which resulted in Roberts making that call. RP 200-201. A moment later, in redirect examination, the following exchange occurred:

> Q: Now, defense counsel asked you in 1989 when you found out about what was going on, you had a meeting with Sarah Kim and your daughter and their parents, right?
>
> A: Right.
>
> Q: And you found out that there was an allegation that something happened in view of Sarah and Kim; is that right?
>
> Q: Yeah.
>
> A: **And you found out that the defendant may have exposed himself to them; is that correct?**

[COUNSEL]: Objection. Beyond the scope.

THE COURT: Sustained.

RP 211-12 (emphasis added). The prosecutor then asked the court to excuse the jury, after which she argued that defense counsel had opened "the door" to the evidence because she had "insinuated that somehow

there was something agreed upon between Amy and Sarah." RP 212. The court said it would not allow the evidence to be admitted and there was a discussion about whether there was a need to "caution the jury to disregard" when the witness did not answer the question. RP 213-14.

At that point, counsel moved for a dismissal based on prosecutorial misconduct. RP 214. Later, with the jury out, counsel said she did not want a mistrial but felt dismissal was the only remedy. RP 217. She noted that she had not elicited testimony about what was specifically said at the meeting. RP 217. She also pointed out that Witt had initially denied that Roberts had called police in 1989 and it was proper cross-examination to elicit that he had done so as a result of the meeting. RP 217.

Counsel argued that the prosecution had "decided to see how far they could push the envelope" regarding bad acts even though the court's ruling was clear on what it would admit. RP 217. She continued:

> [T]he State just put it out there in front of the jury: A man exposing himself to two teenage girls. I don't know any way to unring that bell.

RP 218. The prosecutor claimed she believed "that the defense had opened the door to the circumstances of why those girls were there" for the meeting and that a limiting instruction could be given "to disregard any questions by the attorneys that weren't answered." RP 218.

In ruling, the court noted that the "subject of the defendant calling the police after a meeting" was brought up by the defense. RP 219-22. Although the court acknowledged that counsel had not asked for specifics about what happened or what was said, the court thought the prosecutor could have believed the door had been opened or maybe wanted to

rehabilitate A.B.'s credibility for not recalling the meeting. RP 219-20. The court thought that, while the question was "objectionable" and "beyond the scope," the judge though the prosecutor had asked the question "in good faith." RP 220. The court said it was not "flagrant and ill-intentioned." RP 221. Counsel then stated she was not arguing that the prosecutor had done something "on purpose" but that it was "negligence." RP 220-21.

b. The motion should have been granted

This Court should hold that the trial court abused its direction in denying Roberts' motion to dismiss after the prosecution injected the specter of additional victims and uncharged sexual misconduct into the already highly-charged emotions of the case. The state and federal rights to due process guarantee a defendant the right to a fundamentally fair trial. See, e.g., United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). The idea behind the prohibition against introducing evidence of "prior bad acts" is that the accused is entitled to be tried for what he did, not who he is or his "propensity." See Kelly, 102 Wn.2d at 198.

Here, Roberts was deprived of a fair trial when the prosecutor asked Witt about uncharged allegations that he had exposed himself to not only A.B. but also two of her friends. As counsel said, there is no way that "bell" could be unrung. RP 218.

Under CrR 8.3(b), a court has the authority to, "in the furtherance of justice. . .dismiss any criminal prosecution." The purpose of the rule is "to see that one charged with a crime is fairly treated." State v. Whitney,

96 Wn.2d 578, 579-80, 637 P.2d 956 (1981). While dismissal is an "extraordinary remedy," it should be granted when there is prejudice to the rights of the accused which materially affects his right to a fair trial and the remedy of a new trial is not appropriate. See State v. Baker, 78 Wn.2d 327, 474 P.2d 254 (1970).

That is what Roberts contends occurred here. Already, the jury was inclined to rely on "propensity" to convict, because it had heard all of the evidence about the conduct in 1989, the subject of earlier charges. Into this mix the prosecutor's highly improper questioning added the distasteful image of Roberts exposing himself to *other* teens, as well. Such an image fundamentally changed the dynamic of the trial, ensuring that the jury would be unable to judge Roberts based on what he did, rather than who they thought he was. Roberts contends that the trial court abused its discretion in denying the motion to dismiss the charges and asks this Court to so hold.

2. THE SENTENCING COURT ERRED AND VIOLATED ROBERTS' DUE PROCESS RIGHTS WHEN THE COURT ORDERED FORFEITURE OF PROPERTY WITHOUT ANY STATUTORY AUTHORITY

Roberts is also entitled to relief because the sentencing court acted without statutory authority and violated due process in ordering forfeiture of property as a condition of the sentences.

A sentencing court's authority to impose conditions of a sentence is limited by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Under the Sentencing Reform Act, the Legislature alone has the authority to establish

the scope of legal punishment. Id. As a result, a sentencing court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999).

"Forfeitures are not favored." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). In addition, the authority to order forfeiture is wholly statutory. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998). A trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992).

And this is true even when a defendant is accused of a crime. As this Court has noted, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866. There is no "inherent authority" for a court to order forfeiture, so following the requirements of the relevant statute are needed as it is "the exclusive mechanism for forfeiting property." Alaway, 64 Wn. App. at 800-801.

Here, there was no statutory authority cited when the prosecution requested, almost in passing, "that the defendant forfeit any items that were seized and may be in property." RP 374. There was no further

discussion and on the judgment and sentence, the trial court ordered that Roberts "[f]orfeit any items seized by law enforcement." CP 120.

Thus, it appears the court ordered forfeiture without any process and without statutory authority as well. Even a cursory examination of the law proves this point. While RCW 10.105.010 authorizes law enforcement agencies to seize and forfeit certain items used in relation to or traceable in specific ways to the commission of a felony, the statutory requirements for those forfeitures were not followed here. The seizing agency - here, the police - must serve proper notice on all persons with a known right or interest in the property, who then have a right to a hearing where they can attempt to establish an ownership right. RCW 10.105.010(3), (4) and (5). The forfeiture proceedings are held as a **separate civil matter**, with the deciding authority **not** the superior court. RCW 10.105.010(6). RCW 10.105.010 thus does not support the sentencing court taking the step of ordering, as a condition of a sentence in a criminal case, the forfeiture of property without following any of the requirements of the statute for notice, proof, a possible hearing, etc.

Other forfeiture statutes similarly authorize a law enforcement agency - rather than the sentencing court - to conduct forfeiture proceedings for property in relation to certain crimes. RCW 69.50.505 governs forfeitures related to controlled substances, allowing forfeiture of controlled substances, raw materials for such substances, properties used as containers for them, and other conveyances and items used in drug crimes. To have that authority, however, the "law enforcement agency"

seeking the seizure has to provide notice of intent of forfeiture on anyone with known rights or interests in the property, who then have an opportunity to be heard, often at a civil hearing "before the chief law enforcement officer of the seizing agency," or, if the person exercises the right of removal, may be in a court of competent jurisdiction under civil procedure rules, at which the law enforcement agency must establish that the property is subject to forfeiture. See RCW 69.50.505; Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Other forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its relation to a crime. RCW 9A.83.030 governs forfeitures associated with money laundering and required that the attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, provide notice to all persons with known rights, and gives the person affected the right to a hearing under the same circumstances as in drug forfeiture cases and other rights, prior to forfeiture occurring. RCW 9.46.231 governs forfeitures associated with gambling laws, requiring notice within 15 days of the seizure to any with a known right or interest, the right to a hearing, the right to removal in certain cases, the right to

appeal, and the concomitant right of the state and agency to reap financial benefits from selling the items seized, in various iterations. And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving the person when the item is seized with a written inventory and information on how to get their property back if they believe their property was improperly seized under the warrant. But that rule is limited to items deemed "(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]"

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant seized by police based solely upon his criminal conviction without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. Nor do the statutes authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man or at least the process the Legislature required before such forfeitures may occur. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had "inherent power to order how property used in criminal activity should be disposed of").

Further, as this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead, this Court declared, "the State cannot confiscate" a citizen's

property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the trial court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Thus, under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture.

In response, the prosecution may attempt to rely on State v. McWilliams, __ Wn. App. ___, ___ P.3d ___ (2013 WL 5538724). McWilliams, however, should not control. In that case, the Court refused to strike a forfeiture condition from a judgment and sentence on the grounds that the defendant had not moved for return of property. But the Court did not address RCW 9.92.110 or explain what authority supported the order in the first place. Here, the issue is that the order itself was not authorized by law. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should grant relif.

DATED this 8th day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Sherman Roberts, DOC 962460, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 8th day of November, 2013.

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